Local 282, International Brotherhood of Teamsters, AFL–CIO *and* Mount Hope Trucking Company, Inc. and Local 560, International Brotherhood of Teamsters, AFL–CIO. Cases 29–CD–434 and 29–CD–439

February 15, 1995

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

The charges in this Section 10(k) proceeding were filed May 11 and June 10, 1994, by Mount Hope Trucking Company, Inc. (the Employer) alleging that the Respondent, Local 282, International Brotherhood of Teamsters, AFL–CIO (Local 282) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Local 560, International Brotherhood of Teamsters, AFL–CIO (Local 560). The hearing was held July 14, 21, and 26, 1994, before Hearing Officer Paul Richman.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a New Jersey corporation, is engaged in the business of delivering stone and asphalt materials produced by Mount Hope Rock Products to various locations in the New York and New Jersey area. The Employer annually transports material valued at between $1.5 million and $2 million directly to locations outside the State of New Jersey. Local 560 and the Employer stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[1] The parties stipulated, and we find, that Local 282 and Local 560 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

This dispute arose on a construction site in New York City. Mount Hope Rock Products (Hope Products), a New Jersey corporation that produces fresh stone and asphalt for construction, had a contract to provide a customer, Carlo Lizza and Sons Paving Co. (Lizza), with asphalt for the paving of a parking lot at the Waldbaum shopping center in Queens. Hope Products uses the Employer (Hope Trucking) to effect deliveries of materials it produces, and the price at which the product is sold includes delivery. Employees represented by Local 560 make deliveries for the Employer.

Delivery of asphalt includes transporting the asphalt to the site and delivering the asphalt into the spreader, which spreads the asphalt on the ground. The truckdriver lifts the body of the asphalt truck and the asphalt is dumped from the delivery truck into the hopper of the spreader. The hopper usually cannot hold a truckload of asphalt. Therefore, the spreader and the truck are temporarily joined, and the spreader pushes the truck forward until the truckload of asphalt is dumped into the hopper and eventually spread by the spreader. It is the latter phase of the work that Local 282 has particularly contested, contending that this constitutes ''working the job site'' and should be done by the New York employees who are represented by Local 282.[2]

The Employer's Local 560-represented drivers began making deliveries of asphalt to Lizza on April 5, 1994.[3] On April 6, James Horan, vice president of operations for Hope Products, heard that the next day there would be ''a union problem at the site . . . because Local 282 was going to be picketing the site.'' Horan telephoned Aldo Colussi, secretary-treasurer for Local 282, and suggested to Colussi that there should not be a problem because the Employer's drivers were in a local of the same International. Colussi responded that there was a problem, that Local 282 drivers were out of work, and that this was not Local 560's work. Colussi stated that he would be at the site the next day with picketers.

When Horan arrived at the site on April 7, he saw 50–60 people at the entrances, some of whom wore hats or jackets with the Local 282 logo. Several of them also held picket signs that stated, ''Carlo Lizza'' and ''unfair labor practice.'' At the site, Horan met with Colussi and Vinny Scavetta, a Local 282 delegate

[1] Local 282 would not enter into a stipulation concerning commerce jurisdiction or the nature of the dispute, nor would it stipulate that Mount Hope Trucking was not failing to conform to a Board order or certification determining the bargaining representative for the employees performing the work in dispute. We have based our findings as to these issues on evidence received by the hearing officer.

[2] Unlike the delivery of asphalt, the delivery of stone simply involves transporting stone from Hope Products' quarry in Wharton, New Jersey, and dumping it at the jobsite or plant for which it is destined.

[3] All dates hereafter are in 1994 unless otherwise noted.

from the Bronx. Horan told Colussi that Hope Trucking had already delivered with the Local 560 drivers for the past couple of days, and that he had delivered in the past to New York City. Colussi told Horan that this was Local 282's worksite, that a lot of men were out of work, and that Lizza could get the asphalt from several other companies located nearby. Horan testified that Scavetta stated that ''this is going to happen wherever we go, if we decide to go to another job site . . . that he was going to have strikes at other job sites.'' Scavetta also threatened to talk to another customer with whom Hope Products was negotiating.

When the first Hope Trucking truck arrived, the picketers surrounded it so that the truck could not enter. Only when the police arrived in force later that morning, did the Hope Trucking trucks enter one at a time. The picketers shouted to the drivers as their trucks entered the site where the asphalt spreaders were waiting for the asphalt to be received from the Hope Trucking trucks. Lizza vehicles entered through one of the entrances where the picketers were located but were not approached by the picketers. The Hope Trucking trucks were the only vehicles approached by the picketers that day.

Hope Trucking had a contract to deliver stone to Petosa Brothers, at a construction site at Staten Island College in New York City, as it had done on previous occasions. On June 7, Bryan Misbach, a sales representative for Hope Products, called Horan and told him that there would be ''a union problem tomorrow delivering the stone to the Staten Island College.'' When Horan arrived on June 8, two persons who identified themselves as Local 282 stewards approached him. One of the stewards, A. Schoppo, said that he recognized Horan from the Waldbaum site in Queens. Schoppo asked if Horan had heard about a jurisdictional award in which Local 282 was ''awarded the jurisdictional right to deliver asphalt to the New York sites, and Mount Hope Trucking was not given the jurisdiction[al] right for stone or asphalt anywhere in New York City or the five boroughs.''[4] Horan said that he had not been informed of such a decision and told Schoppo that he was to deliver several loads to this site. Schoppo suggested that Horan have the stone dropped off elsewhere.

Later that morning when a Hope Trucking vehicle entered the worksite, Schoppo told the driver that this was a sanctioned strike. When the driver said that he did not see picket signs, Schoppo had a sign placed on a car windshield which had the words ''Petosa'' and ''area standards'' on it. Schoppo continued his conversation with the driver stating that Local 282 drivers got $22 per hour while Local 560 drivers receive $12 an hour, that this was the work of Local 282, and that the trucks were not going to deliver to the site. At this time several trucks of other companies, including a Petosa truck, entered the site without being stopped. Horan and the Local 560 driver spoke by telephone with Local 560 Representative Carmine Pizzuto who said that Local 560 would honor the strike. The driver then said he would honor the strike. As a result, Hope Trucking made no deliveries that day although there were 10 deliveries scheduled. There has been no further picketing.

[4] No jurisdictional award was introduced into the record.

B. *Work in Dispute*

Local 282 would not stipulate to the work in dispute. Local 282 claimed that it had no dispute with Hope Trucking but that its dispute was with other employers who use the services of Hope Trucking instead of adhering to the terms of their collective-bargaining agreements with Local 282. Based on evidence adduced at the hearing, we find that the work in dispute includes all hauling and delivery of rock, asphalt, and related products assigned to drivers by Mount Hope Trucking Company, Inc. to the Carlo Lizza & Sons construction site at the Waldbaum shopping center in the Borough of Queens, New York City, and to the Petosa Brothers construction site at Staten Island College in the Borough of Staten Island, New York City.

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Local 282 violated Section 8(b)(4)(D) of the Act. The Employer further contends that the work in dispute should be awarded to employees represented by Local 560 on the basis of the collective-bargaining agreement, employer preference and past practice, area practice, and efficiency and economy of operations. The Employer seeks an award coextensive with the geographical jurisdiction of Local 282 and Local 560 because both will continue to claim this work and Local 282 has demonstrated a proclivity to engage in unlawful conduct in order to ensure that the disputed work is assigned to employees it represents.

Local 282 contends that it has no dispute with the Employer and, at the hearing, moved to dismiss the proceeding, arguing that its dispute is a contractual one with employers under contract with Local 282 who have violated the subcontracting clause in their contracts by subcontracting work to Mount Hope.[5] Local 282 argues that there is no basis for a finding of ''reasonable cause'' that Local 282 engaged in unfair labor practices within the meaning of Section 8(b)(4)(D),

[5] The contract clause that Local 282 relies on states as follows:

> The Employer shall not hire outside trucks or equipment unless all his available, suitable trucks and equipment are in use. Thereafter, the Employer shall hire only from others whose drivers receive wages, working conditions, benefits and standards of employment at least as favorable as those contained herein.

which is the jurisdictional underpinning for this proceeding. Citing *Teamsters Local 578 (USCP-Wesco)*[6] and *Chicago Web Printing Pressmen's Union 7 (Metropolitan Printing Co.)*,[7] in which the Board declined to assert jurisdiction under Section 10(k), Local 282 contends that Section 10(k) jurisdiction may not be a substitute for the resolution of contractual disputes between an employer and a union.[8]

Local 282 further contends that the parties have agreed to be bound by the determination of the International Brotherhood of Teamsters (IBT). Specifically, Local 282 argues that Local 560 and Local 282 are bound by the constitution of IBT, and that the Employer is bound because its most recent collective-bargaining agreement with Local 560 provided: ''The Employer agrees to respect the jurisdictional rules of the Union.''

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that there is no agreed-upon method for the voluntary adjustment of the dispute.

As discussed above, Local 282 Secretary-Treasurer Colussi told Employer's vice president, Horan, that the delivery work was Local 282's work and threatened to and did in fact picket the Lizza construction site. During the picketing, Local 282 Delegate Scavetta told Horan that he was going to have strikes at other jobsites, and that this would happen wherever he went. In the second incident of picketing, at the Petosa construction site, Local 282 Steward Schoppo told a Local 560 driver that the strike was a sanctioned strike, that the work belonged to Local 282, and that the trucks were not going to deliver to the site.

Based on the foregoing, we find reasonable cause to believe that Local 282 has violated Section 8(b)(4)(D).

We further find that this case is distinguishable from *USCP-Wesco* and *Metropolitan Printing Co*., supra, cited by the Respondent and from *Longshoremen ILWU Local 8 (Waterway Terminals Co.)*[9] and *Highway Truckdrivers & Helpers Local 107 (Safeway Stores)*.[10] Each of those cases involved a claim against an employer by a union seeking to prevent reallocation of work in order to protect bargaining unit work from erosion. In those cases, the essential dispute was between a union and an employer rather than between rival groups of employees. In the instant case, there is no work preservation issue because there is no evidence that employees represented by Local 282 have ever performed the disputed work for the Employer pursuant to their collective-bargaining agreement. Because the Local 282-represented employees have never performed this work, unlike the cases cited above, there is here no union's '''attempt to retrieve the jobs' of employees whom the employer chose to supplant by reallocating their work to others.''[11] We find that the real dispute here is between employees represented by Local 282 and those represented by Local 560, and that Local 282 is attempting to capture for its employees work that the Local 560-represented employees have always performed. Thus, we conclude that the evidence in this case is sufficient to establish a jurisdictional dispute between two groups of employees that is cognizable under Section 10(k) of the Act. Accordingly, the Respondent's motion to dismiss is denied.

Local 282 further contends that there is an agreed-upon method of adjustment between the parties. Local 282 claims that a dispute between Local 282 and Local 560 concerning each union's jurisdictional area is now pending before the International Brotherhood of Teamsters, and that all parties are bound by the determination of the International. In this connection, Local 282 maintains that, by entering into a contract with Local 560 which stated that the Employer agreed to respect the jurisdictional rules of the Union, the Employer agreed to be bound by the determination of the IBT.

The provision which Local 282 cites reads in full as follows:

> (a) The Employer agrees to respect the jurisdictional rules of the Union, and shall not direct or require their employees or other persons other than its employees in the bargaining unit hereto involved to perform work which is recognized as being within the Teamsters jurisdiction.

Whatever the arguable significance of this clause, we note that the most recent collective-bargaining agreement between the Employer and Local 560 expired on August 31, 1991, prior to any claim to the disputed work by Local 282. In these circumstances, even if the contract provision could reasonably be interpreted in the manner urged by Local 282, we are unable to find

[6] 280 NLRB 818 (1986), enfd. 827 F.2d 582 (9th Cir. 1987).

[7] 209 NLRB 320 (1974).

[8] The Respondent also contends that the alleged strike on June 8 was not authorized. We find it unnecessary to decide in this 10(k) proceeding whether the Respondent is legally responsible for the stewards' actions because the Board, in a jurisdictional context, is not charged with finding that a violation actually occurred, but only that there is reasonable cause to believe that Sec. 8(b)(4)(D) has been violated. See *Mine Workers (Stag Construction)*, 313 NLRB 434, 435 (1993).

[9] 185 NLRB 186 (1970), vacated and remanded 467 F.2d 1011 (9th Cir. 1972), on remand 203 NLRB 861 (1973).

[10] 134 NLRB 1320 (1961).

[11] *Waterway Terminals Co*., supra at 188, quoting in part from *Safeway Stores*, supra.

that the Employer is bound to a means for the voluntary settlement of the instant dispute.[12]

We conclude that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following facts are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

There is no evidence that either of the Unions was ever certified by the Board to represent the employees of the Employer. The Employer had collective-bargaining agreements with Local 560 commencing in 1985 which covered all deliveries of its stone and asphalt products within a 135-mile radius of Mount Hope's quarry in New Jersey. However, the most recent contract expired August 31, 1991. The Employer has never had a collective-bargaining agreement with Local 282. This factor does not favor the award of the disputed work to either group of employees.

2. Employer preference and past practice

The Employer prefers that the work in dispute be performed by employees represented by Local 560. The Employer has used employees represented by Local 560 to do this type of work since at least 1985 and prefers to continue to do so. There is no evidence that employees represented by Local 282 have ever performed this work for the Employer. Records in evidence show that between 1989 and 1994 Hope Trucking delivered approximately 38,000 truckloads of asphalt and 227,000 loads of stone to jobsites in New York City. These included deliveries for Lizza to 26 separate jobsites in New York City and 5 separate jobsites in other areas of New York State. The Employer submitted documentary evidence which shows that from 1989 to 1994, about 15 percent of its deliveries of asphalt and 36 percent of its deliveries of stone were to New York City. The Employer used its own employees represented by Local 560 for all of this work. We find that the factor of employer preference and past practice favors an award of the disputed work to employees represented by Local 560.

3. Area and industry practice

No evidence was presented with respect to industry practice. With respect to area practice, Colussi testified that when a company employing Local 282 had suitable and available equipment, as was the case with Lizza, it was customary for Local 282 to ''work the job site,'' i.e., dump the asphalt into spreaders as the spreaders distributed or laid down the asphalt over the worksite.[13] If the company had no such equipment, then under the terms of the collective-bargaining agreement, it could subcontract to other companies which had equivalent standards. Although Colussi contended that Mount Hope could have dropped the asphalt and allowed a Lizza truck to reload and place it in the spreaders, he could cite only one instance where this had occurred and that was caused by unusual circumstances.

The procedure followed almost exclusively by the Employer is that the same truck that delivers the asphalt unloads into the spreader at the worksite. Horan testified that it was his business to be familiar with area practices regarding delivery of rock products and asphalt into the New York area because Hope bids the same jobs as some of the other suppliers. He stated that the delivery practice of other area companies, which he identified by name and classified as ''everybody along that corridor,'' was the same as Mount Hope's.

We find that the evidence of area practice is inconclusive and that this factor does not favor an award of the disputed work to either group of employees.

4. Relative skills

The evidence shows that employees represented by Local 282 and employees represented by Local 560 both have the skills to perform the delivery of asphalt and stone. We find that this factor does not favor the award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Local 282 has suggested several ways in which the Employer could allow employees represented by Local 282 to perform the work in dispute.

First, Local 282 suggested that the Employer's employees represented by Local 560 dump the asphalt and allow the New York employees represented by Local 282 to reload the asphalt onto other trucks and dump it into the spreader. However, Horan testified

[12] See *Jacksonville Tile Co.*, 125 NLRB 138, 142–143 (1959).

[13] The spreaders were normally operated by employees represented by other unions.

that dumping the asphalt on the ground in order for it to be reloaded onto another truck, rather than unloading directly into the spreader, would result in the asphalt separating and losing its evenness. The result would be that the asphalt would not be spread according to specification and the Employer would consequently be penalized by its customers.

Next, Local 282 suggested that Mount Hope could deliver its asphalt and stone to locations away from the worksite or, alternatively, purchase the materials from suppliers in New York, and then allow the New York purchaser's employees represented by Local 282 to pick up and deliver the product to the jobsite. The Employer presented evidence that either of these alternatives would be more expensive than its current practice. It would be much more costly to deliver asphalt or stone to locations away from the worksite because this would entail additional cost of delivery from the drop off point to the worksite. The Employer would not recoup this cost because its asphalt price is the price delivered to the worksite. If the Employer purchased the asphalt from a supplier near the worksite, it would result in its not using its investment in the New Jersey facility which produces these materials.

Finally, Local 282 argued that employees represented by Local 560 could drive the product from the quarry to the worksite in the Employer's trucks and then allow employees represented by Local 282 to take over and unload the trucks. The Employer demonstrated that this would result in considerable increase in costs. Hope Trucking would have to pay Local 282 drivers to unload the trucks and would also have to pay its Local 560 drivers for the same time spent at the site.

We find that the factor of efficiency and economy of operations favors awarding the disputed work to employees represented by Local 560.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 560 are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 560, not to that Union or its members.

Scope of the Award

The Employer contends that the determination should be broad enough to encompass the geographical area where the Employer does business and where the jurisdictions of the competing unions coincide. For the Board to issue a broad, areawide award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area and that similar disputes are likely to recur. There must also be evidence which demonstrates that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 211 (Sammons Communications)*, 287 NLRB 930, 934 (1987).

We have determined that there is reasonable cause to believe that in two separate incidents, on two different jobsites, involving different contractors, Local 282 violated Section 8(b)(4)(D) of the Act through threats and picketing to coerce the Employer to assign work to employees it represents rather than to employees represented by Local 560. In addition, the Employer presented evidence that in the first incident Scavetta threatened that he was going to have strikes at other jobsites and that there would be a problem wherever Mount Hope went. Horan testified that at the Staten Island College construction site, Schoppo told him that ''there was no way that a Mount Hope truck was going to deliver material to that job site that day or any other job site.'' Thus, it appears that assigning work similar to the disputed work will continue to be controversial, as the Employer intends to continue assigning the work to employees represented by Local 560, and Local 282 has shown by its statements and conduct that it will likely resort to conduct prohibited by Section 8(b)(4)(D) in order to obtain that work for employees it represents.

In light of the evidence presented in this case, we find that there is ample evidence that similar disputes may occur in the future at other sites where the Employer attempts to deliver asphalt and stone. Accordingly, our determination in this case applies to all similar disputes concerning the Employer's delivery work where the geographical jurisdictions of Locals 282 and 560 coincide. See *Glaziers Glassworkers Local 636 (Plaza Glass Co.)*, 214 NLRB 912, 915 (1974).

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of the Employer represented by Local 560, International Brotherhood of Teamsters, AFL–CIO are entitled to perform the work of hauling and delivering rock, asphalt, and related products within a 135-mile radius of the Mount Hope quarry where the jurisdictions of Local 560 and Local 282, International Brotherhood of Teamsters, AFL–CIO coincide.

2. Local 282, International Brotherhood of Teamsters, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local 282, International Brotherhood of Teamsters, AFL–CIO shall notify the Regional Director for Region 29 in writing

whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.